THEORIES AND TESTS OF MONOPOLY CONTROL

The complex nature of monopoly control has required the best efforts of judges, legislators, and economists to define it. But as yet there is practically no agreement as to its description or its classification. In the recent decision of the Standard Oil suit, the Supreme Court of the United States said: "It is not necessary in this case, and we doubt whether in any case it is possible, to make a comprehensive definition of monopoly which will cover every case that might arise."[1] This statement relates to a question which has long baffled the jurists of England and the United States. At the same time the definition of this term has puzzled the members of Congress. In considering section two of the Clayton bill, Senator Gray confessed that he did not know what definition the courts of the United States had given to the word "monopoly." And Senator Hoar of the committee in charge of the bill replied that its members had also met with the same difficulty. But he had finally become satisfied that "the word monopoly is a merely technical term which has a clear and legal significance, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." However, the latter did not think that the courts would consider a man a monopolist who by superior skill and intelligence "got the whole business because nobody could do it as well as he could." Obviously Senator Hoar was in error here, and in his reply to Senator Gray he brought out incidentally the greatest difficulty before our courts in this definition of monopoly. It is the important task of distinguishing between a monopoly established wholly by more efficient methods and one acquired by means which restrain competition and restrict trade. But this confusion of ideas is common to all investigators in the field of law and of economics. Certain it is, that all authorities are sadly at variance in their definition and classification of monopoly control; and this divergence is constantly accentuated by the influence of economic conditions. In view of this fact the most important theories and tests, as they are found in the opinions of jurists and economists, are presented here in emphasizing the economic and legal status of both the scarcity and efficiency monopolies.

English and American courts have taken at least six different attitudes in applying the theory of monopoly to concrete cases. First, under the early common law a person possessed a monopoly

[1] *Standard Oil* v. *United States,* 221 U. S. 27.

if he had secured a differential advantage which allowed him to maintain permanently a fixed price for any single commodity. And whether this monopoly was public or private, he was compelled under the provisions of this law to offer reasonable rates to all persons. In the second place, all English courts recognized the institution of monopoly as an allowance or exclusive grant from the king. However, it became illegal if it restrained a person's freedom or liberty or hindered his lawful trade. Also, at a much later time, monopoly has been defined in not a few states as absolute power or control over some specific branch of industry; and this principle, running through two stages of evolution is still a menace to our public welfare. Yet in other states, a small group of judges had realized by 1875 that to secure control over a large industry is practically impossible, that the public is often deliberately exploited by means of a limited or partial control over trade, and that when this partial control is sufficient to destroy effective competition, it constitutes a monopoly. Still again, another class of jurists have enforced the more radical theory, that the inchoate monopoly—the combination which possesses merely a definite tendency to suppress competition and to control price—is also illegal. The inchoate form is really a coöperative combination which has become a potential monopoly with power to eliminate competitors. This interpretation, needless to say, is a very broad construction of the meaning of monopoly, and where thoroughly enforced it should do much to check united action by combinations to destroy competition. Finally, the efficiency monopoly based wholly upon normal and more efficient methods of production occupies a secure foothold in American law. These six threads of economic theory more or less interwoven will be traced through the labyrinth of legal opinions and the writings of economists.

1. Strangely enough, the first important theory of monopoly to be accepted by both jurists and economists was the concept of a "differential" advantage by which the seller was able to control price. To overcome this economic advantage, the courts of medieval England forbade the establishment of a permanent price; buyers and sellers were accordingly compelled to bargain or higgle freely with each other. Of the various opinions on this point, none is more comprehensive than the statement of Chief Justice Hale: (a) No man according to Morgan's case was allowed to charge constant rates for unloading merchandise at English ports, but he

might make "particular agreements with every one."[2] (b) The owner of a private wharf or crane was entitled to any rate, provided it was secured by a separate agreement. (c) But if any person owned a public wharf, or the only one in a port, it was then affected with a public interest and he must charge only reasonable and moderate rates.[3] In a similar suit, the defendant controlled a street used by the public; and Chief Justice Ellenborough declared: "If he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."[4] It is therefore clear that every man could place any usual price on his own property, provided that a separate bargain were made with each purchaser. A monopoly based upon a differential advantage or privilege, then, was not necessarily illegal if all charges were fair and reasonable. The test of this monopoly was obviously the power of controlling exchange values; but as the ability of the purchaser to pay was always an important factor, the courts demanded separate agreements and a fair price.

Much later certain English economists adopted the concept of a differential monopoly, but the peculiar advantage held by the monopolist was not necessarily sufficient to allow him to fix exchange values. In this respect their ideas differed from those of the jurists. This theory of a differential monopoly appears in various discussions of rent. Thus Adam Smith says: "The rent of land, therefore, considered as the price paid for the use of the land, is naturally a monopoly price."[5] In like manner the term monopoly is used by Malthus to describe a definite scarcity condition of the land or soil: "That there are some circumstances connected with rent which have an affinity to a natural monopoly will be readily allowed." And in the same paragraph he continues: "On this account, perhaps, the term partial monopoly might be fairly applicable."[6] Still again, of a contemporary of Malthus, Ricardo has asserted: "Mr. Buchanan considers corn and raw produce as at a monopoly price, because they yield a rent: all commodities which yield a rent, he supposes must be at a monopoly price."[7] But somewhat suddenly the theory of monopoly was so

2 P. 11 Car. B. R.

3 *Hargrave's Tracts,* part II, ch. VI, pp. 77, 78.

4 *Altnut* v. *Inglis,* 12 East. 537.

5 *Wealth of Nations,* ch. XI, introduction.

6 *An Inquiry into the Nature and Progress of Rent,* p. 7.

7 Ricardo, *Principles of Political Economy,* p. 236.

greatly expanded by Senior that it includes both efficiency profits and the pure value surplus. According to this author any differential advantage arising from (a) soil or situation, (b) extraordinary talent of mind or body, (c) secret or protected processes, constitutes a monopoly. Clearly enough, Senior's concept embraces the differential advantages of efficiency and the natural advantages of soil and situation; for in his four classes of monopoly he has covered almost the entire field of industry.[8] But in the works of J. S. Mill the idea of monopoly is again discussed almost entirely in connection with land: "It is at once evident," he explains, "that rent is the effect of monopoly; though that monopoly is a natural one." And again he says: "A thing which is limited in quantity, even though its possessors do not act in concert, is still a monopolized article."[9] Few English economists, however, go so far as to apply the term monopoly gain to the returns on what Senior has defined as exceptional or rare natural gifts. In America we are familiar with the theory of a differential monopoly as it has been presented in the writings of Professor Simon N. Patten[10] and Professor Emory R. Johnson.[11] These men make the concept of a differential monopoly include any surplus above costs which may be acquired in either production or consumption. In like manner this all-inclusive idea of monopoly, with its apparent confusion of earned and unearned incomes, may be found in the text of the French writer, Professor Gide: "The monopoly element is present everywhere. The small grocery store at the street corner enjoys a monopoly because of its location. A man's individuality, that is to say the simple fact that he is himself and not some one else, really constitutes a monopoly."[12]

This theory of a differential monopoly may be taken as one extreme view in the list of monopoly concepts; the other extreme is the theory of an absolute monopoly. At the present time the pendulum in economic and legal discussions has reached the theory of an absolute monopoly and is rapidly returning to the concept of a differential advantage or partial monopoly. Moreover, recent legal decisions containing the concept of a differential

8 Senior, *Political Economy,* p. 103.

9 J. S. Mill, *Principles of Political Economy,* bk. II, ch. XVI, sec. 2.

10 *Annals of the American Academy,* Jan., 1893; *Dynamic Economics,* pp. 63, 102, 107, 114.

11 *Ann. Am. Acad.,* June, 1894.

12 C. Gide, *Principles of Political Economy,* third edition, p. 626.

monopoly have led to an apparent conflict in judicial opinion. That is, one partial monopoly, according to the various tests applied by the courts, may be illegal, while a second one is wholly immune under the statutes. The first is similar to the early monopoly of the English common law; the second resembles much the differential monopoly of the classical economists. Clearly enough, the latter may increase in size and dominate industry so long as it does not eliminate competitors, unreasonably restrain trade, or control price. Protected by the "rule of reason" in judicial interpretations, it stands alone at one extreme, secure in law, as a monopoly of efficiency.

2. Doubtless the most persistent form of monopoly control to come before the early English courts was an exclusive grant from the king. According to Lord Coke, "A monopoly is an institution, or allowance by the king or by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedom, or liberty that they had before, or hindered in their lawful trade."[13] At least within certain prescribed limits, this grant was an exclusive monopoly. Especially did Coke emphasize the word "sole" in this connection. This adjective was applied to five things, four of which were the buying, selling, making, and working of a good, while the fifth was the "using" of it. Indeed, the terms "sole using" were considered so general that no monopoly could exist beyond the reach of the statute.[14] The characteristics of an unlawful monopoly were, then, its exclusive powers and its restriction of a person's freedom or his trade. These were important tests, for it was held in common law that a man's freedom and his trade were his very life. Coke tells us that a man's "trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh a man's trade taketh away his life."[15] The part taken by this early monopoly in English history lends emphasis to its definition and to the accompanying tests given here by Lord Coke. Toward the end of the sixteenth century, the grant of special patents by the crown had been so frequently extended to ordinary trades and commerce that in these fields they were strongly opposed

13 Coke, *Third Institute,* ch. 85, p. 181. See statute, 21 Jac. 1 c. 3.

14 *Ibid.,* p. 181.

15 *Ibid.,* p. 181.

by common law courts. But Coke's definition of monopoly has left a lasting impression on American law; in fact, it has served as a legal basis for the concept of an absolute monopoly which is still a menace to the public welfare.

3. The third important concept to appear in the common law was that of absolute and complete monopoly control. An appropriate precedent for this view was found in the old English case of *Mitchell* v. *Reynolds*. It is said there that "it can never be useful to any man to restrain another from trading in all places . . . unless he intends a monopoly, which is a crime." This statement became the controlling principle of various decisions. The exclusion of a person from pursuing his trade within a state was therefore taken by American courts to be an improper exercise of monopoly power. Reference was often made, however, to two other statements from the same case, which conceded partial restraint of trade and hence convey more clearly the meaning of the court: "1st, That to obtain the sole exercise of any known trade throughout *England*, is a complete monopoly, and against the policy of the law. 2dly, That when restrained to particular places or persons (if lawfully and fairly obtained) the same is not a monopoly."[16] These two excerpts distinguish, then, between monopoly and partial control over trade. The sole exercise of any known trade throughout England is a complete monopoly; and not until unified control over an industry is extended to state boundaries does it become a complete monopoly or a crime. Down to 1875 the comments expressed in this opinion dominated in greater or less degree legal discussion in all state cases relating to restraint upon American trade.

The obvious test here of monopoly control is simply size or territorial extent. The courts do not measure the size of a combination by the capital invested or by its output, but by its area; and to become a monopoly it must cover at least an entire state. Following this English theory, *size continued to be the judicial test of monopoly control* in American states throughout the first stage of the absolute theory.[17]

Furthermore, in this first stage, the principle of potential competition was a necessary complement of the absolute theory. It was held in harmony with English law that unless monopoly con-

[16] I P. Wms. 187, 192.

[17] This fact is denied by Professor Kales in *The Harvard Law Review* for June, 1917.

trol covered an entire state, distant or potential competition would furnish an effectual check upon the exercise of such power. Thus in 1839, the formal charge in a New York case that a combination had endeavored to secure a monopoly over transportation on the Erie canal, was considered by the court to be little more than a string of words; for "all the world besides were left at full liberty to enter upon the same enterprise."[18] In this last statement lies, of course, the fundamental legal doctrine of potential competition. This leading opinion was cited later in the Wisconsin case of *Kellogg* v. *Larkin,* which involved an agreement between a group of mill owners and warehousemen to control the Milwaukee wheat market. To give emphasis to this view of monopoly, the court also quoted from the above-mentioned English case. Clearly enough, potential competition was relied upon to check the growth of monopoly power; and this principle was presented in a vigorous outburst: "I say there was no monopoly intended, none effected. We cannot fail to perceive, that in spite of this contract, all the rest of Wisconsin was an open and unrestricted market for the sale of wheat."[19] The English doctrine penetrated as far west as California, as far south as Texas, and as far north as Ontario.

The second stage in this theory of absolute control had its genesis in Coke's definition of monopoly as a grant from the king. The evolution was timely, and bolstered most effectively the belief in an exclusive monopoly.[20] Moreover, with this second definition there is less tendency to emphasize potential competition or to make the limits of monopoly coincident with state boundaries. The direct connection between this definition and the more recent legal concept of absolute control may be traced in a number of instances. But in none is it more apparent than in Greene's case.[21] Several definitions were reviewed by the court, and it was stated that each one contained two distinct elements which prevented the exercise of a right or liberty formerly open to the public. It was, therefore, concluded relative to any monopoly of interstate commerce that it must include an attempt to secure "an exclusive right in such

18 *Chappel* v. *Brockway,* 21 Wend. 163, 165.

19 3 Pin. 144, 145.

20 "A monopoly is when the sale of any merchandise or commodity is restrained to one, or a certain number; and has, says Coke, three inseparable consequences; the increase of the price, the badness of the wares, the impoverishment of others." 7 *Dane's Abridgment,* p. 38, ch. 205, art. 5; *City of Seattle* v. *Dencker,* 58 Wash. 501; *Wright* v. *State,* 88 Md. 436.

21 52 Fed. Rep. 116. See *Patterson* v. *Wellman,* 5 N. D. 608, 615, 616.

trade or commerce by means which prevent or restrain others from engaging therein."[22] On similar grounds but entirely independent of these first decisions, the courts of California have been able to retain the previously adopted theory of a complete monopoly by a well-rounded formula drawn from the definitions given in several dictionaries.[23] However, it is to be observed that even the latter definitions were usually drawn in turn from Coke's theory of an absolute monopoly.[24]

This second stage in the evolution of the theory of absolute monopoly is more permanent than the first, but the present menace to the age-long competitive check against combinations may, perhaps, be only temporary. Moreover, this doctrine of complete and absolute control is being somewhat modified by present economic conditions. Since the sudden evolution in industrial combinations has foisted new problems upon the courts, the latter have been more or less at sea on questions concerning monopoly. English cases have been quoted less frequently, judges have been groping for precedents and authority; and, as in the case of California, dictionaries have often aided them in maintaining the idea of an absolute monopoly. But despite all this, the theory of an absolute monopoly is seldom in accord with concrete facts. Most monopolies are usually disposed of in state courts as mere associations in restraint of trade; some are branded as combinations to

22 Greene's case, 52 Fed. Rep. 116.

23 *Herriman* v. *Menzies,* 115 Cal. 21.

24 A marked tendency is also seen in the decisions of certain federal courts to transfer this absolute theory, irrespective of its original meaning, to combinations in restraint of trade. In 1892 various dealers in five states combined by contract to advance the price of pine lumber fifty cents above its regular quotation. It was held that the agreement was valid because it did not include the entire traffic in lumber or raise the price generally (*United States* v. *Nelson,* 52 Fed. Rep. 647.) Again, in a suit in Missouri involving the sale of goodwill, the federal court followed the definition given in the Greene case: "Monopoly implies an exclusive right, from which all others are debarred, and to which they are subservient." (*U. S. Chem. Co.* v. *Prov. Chem. Co.,* 64 Fed. Rep. 949.) In 1908, a circuit court of the United States quoted the definition of an absolute monopoly, but applied to the case at bar, however, the one given in the Century dictionary: "The possession or assumption of anything to the exclusion of other possessors: thus a man is popularly said to have a monopoly of any business of which he has acquired complete control." (*Continental Sec. Co.* v. *Interborough* R. T. Co., 165 Fed. Rep. 956.) The following year, we find another federal court giving almost the same meaning to the word "monopoly" in the Anti-Trust Act of 1890. (*U. S. Am. War Stores Co.* v. *U. S.,* 172 Fed. Rep. 457.)

raise the price of necessities; others are condemned as conspiracies to injure competitors. Finally, it may be said that the law on this subject is rapidly crystallizing and that the definitions of what constitute an absolute or a complete monopoly are constantly growing less precise.

Still again, this theory of a complete monopoly finds its expression in the writings of many economists who restrict the monopoly control to one person or to a single group of persons. The first important concept in these definitions makes the essence of monopoly equivalent to single control or unity of action with respect to the supply and price of a commodity. Although this idea has certainly been in use for more than two centuries, it has grown in importance in recent years; and the fullblown theory is elaborated at length in several texts, both legal and economic. Professor Ely puts this idea into a very concise form in his definition of monopoly: "Monopoly means that substantial unity of action on the part of one or more persons engaged in some kind of business which gives exclusive control, more particularly, although not solely, with respect to price."[25] This is substantially the definition adopted in a more terse form by Professor Bullock in his *Introduction to the Study of Economics:* "A monopoly exists wherever one person or a combination of persons acquires control of the supply of a commodity."[26] How widely different this concept is from the previous ideas, which make monopoly equivalent to a differential advantage has been emphasized by both of these authors.

The same view is taken by Seager, Taussig, and F. M. Taylor. The first writer has drawn a distinction between monopoly and differential advantage: "In nearly every branch of competitive business differential advantages are found"; and competitors are themselves differently endowed, some being more capable than others and receiving larger returns. "Although important sources of income, such differential advantages are not the cause of monopoly profits."[27] Taussig also touches upon this topic of "differential advantage," and his conclusion is similar to that of Seager: "Rent has often been said to be due to monopoly. But this is not an accurate statement. The characteristic of monopoly

25 R. T. Ely, *Monopolies and Trusts,* p. 13, 14.

26 C. J. Bullock, *Introduction to the Study of Economics,* pp. 216, 309.

27 H. R. Seager, *Introduction to Economics,* p. 188.

is single-handed control over the total supply."[28] To make our analysis perfectly fair still another quotation may be added from a recent textbook. In discussing the subject of normal price as it occurs under conditions of monopoly, Professor F. M. Taylor has this to say: "Substantially the whole output or stock of not a few kinds of goods is in the exclusive control of a single natural or legal person. Such a condition of things is known as a monopoly. The person having such exclusive control of stock or output is said to have a monopoly."[29] In denying the theory of a differential monopoly, each writer here has in turn founded monopoly upon exclusive command over supply, which is obviously identical with the legal principle of absolute control; and these excerpts stand as authoritative statements of the scarcity theory of monopoly control, a view still to be revised and supplemented before it will accord with the logic of concrete circumstances.

It is freely admitted, however, by writers who hold this particular view, that often only a partial control exists over the price or the supply. But even such a statement is usually vague for two reasons. Partial control may often mean more or less intermittent or limited interference in the price-making process with regard to product, time, or territory, and as such represents only a differential advantage on the part of a single group of men. Further, this control may be the result of mere coöperative effort on the part of energetic producers. By this obvious departure from the main premise of single-handed control over supply, the orthodox economic theory of monopoly control is greatly weakened, and varies from the idea of the classical economists only in assuming a greater degree of differential advantage, which finally gives partial control over price. Simply stated, all authorities are coming to the idea of a partial monopoly. In the doctrine of the classical theorists this advantage does not necessarily give control over either supply or price, while in the scarcity control of later writers, the advantage is sufficient to control price over a definite territory.

4. With the gradual decline in law of Coke's legal formula, there appeared the fourth important theory of monopoly. And strange to say, the famous opinion of the early Mitchell case in England also furnished the foundation for a belief in *partial monopolies*. It was explained there that voluntary restraints of trade are liable to abuse "from corporations, who are perpetually

[28] F. W. Taussig, *Principles of Economics,* vol. II, p. 107.

[29] F. M. Taylor, *Principles of Economics,* p. 207.

laboring for exclusive advantages in trade, and to reduce it into as few hands as possible."[30] This excerpt was often quoted verbatim or paraphrased by American courts. From this new point of view competitive checks were soon placed upon monopolies in the states of Massachusetts and Pennsylvania.[31] And the tendency in both states to perpetuate free competition between combinations, was a welcome harbinger of a new tenet in judicial opinions. Indeed, as a principle involving the right to industrial liberty, it was soon to form the most potent check upon monopoly; for a marked divergence from the legal concept of an absolute monopoly began as early as 1875. Consequently, potential or distant competition is less emphasized. The first opinion to apply an active competitive check to a monopoly entirely within a state rendered void a contract between all the grain dealers in a single town in Illinois.[32] Clearly enough, active competition within the *monopolized area* was recognized as the only adequate economic check upon this form of combination. Five years later, an Ohio court gave the much needed support to this idea of an active competitive check upon monopoly. An association formed for the purpose of controlling the sale of salt throughout the state was held to be in general restraint of trade; and the apparent tendency of the combination to establish a monopoly by a partial suppression of active competition was taken as sufficient cause for its compulsory dissolution.[33] During the next ten years the tide of legal opinion turned rapidly against monopolistic combinations, and in the last decade of the nineteenth century, as one might expect, the theory of a partial monopoly became firmly established in American law.

5. The fifth legal concept of monopoly made its appearance at least as early as 1880. This is the theory of a potential or inchoate monopoly, and it is admirably presented in this last decision: "It is no answer to say," declared the court, "that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the

30 I P. Wms. 190.

31 *Alger* v. *Thacker,* 19 Pick., 53, 54; *Taylor* v. *Blanchard,* 13 Allen, 375; *Morris Run Coal Co.* v. *Barclay Coal Co.,* 68 Penn., 185, 187.

32 The contract of 1859 was illegal simply because it enhanced the price of a prime necessity. (14 La. Annual 168.)

33 *Central Ohio Salt Co.* v. *Guthrie,* 35 Ohio St. 672.

public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."[34] This opinion represents the most radical evolution in common law rulings against combinations in restraint of trade. Any definite tendency which may seriously threaten active competition, is sufficient to render their formation illegal. It is, in fact, an effort to suppress inchoate monopolies. In several states, of course, this potential monopoly is quite secure; but in others it is plainly illegal.[35]

However, extensive monopolies of this sort often exist on a mere tacit understanding; they are no longer exceptions to the rule. In *Harding* v. *American Glucose Company* it was emphasized that such unlawful combinations may be formed by verbal agreement.[36] And in similar cases in Kentucky, it is not necessary in order to obtain a conviction in court that there should be positive evidence that a combination was formed to regulate prices. It would be difficult, if not impossible, the Supreme Court has said, to secure witnesses who could testify to such facts.[37] Finally, upon this exact point the highest court in Michigan is most explicit: "The purpose and intent of the organization may be shown by its acts and the policy pursued after organization." It is not deemed necessary to furnishing evidence of this purpose, to prove that its organizers expressly bound themselves "to establish and maintain a monopoly."[38] The fundamental purpose of these various decisions is doubtless to condemn any tacit monopoly which is destructive to competition; but on the other hand, there is apparently no intention of hampering mere coöperative combinations, provided rival enterprises are allowed to compete freely.

[34] *Salt Co.* v. *Guthrie,* 35 Ohio St. 672.

[35] A most thoroughgoing opinion against it is to be found in a New York case: "If the monopoly sought to be established was one covering a part of the territory of the borough, or one district in the borough, so that the consumers in that portion of the city were deprived of the benefit of free competition, then the defendant would be just as guilty as though the monopoly extended to every foot of land within the boundaries of Manhattan." (*People* v. *Am. Ice Co.,* 120 N. Y. Supp. 457.) From this excerpt two facts are to be noticed: first, the smallest district within a borough is not exempt from the law; second, the primary test of illegality is the absence of free competition which is taken as an indication of monopoly. This decision, like many others, has gone to the heart of the problem by condemning virtually all monopoly agreements.

[36] 182 Ill. 617.

[37] *International Harvester Co.* v. *Commonwealth,* 144 Ky. 403, 408.

[38] *Attorney General* v. *National Cash Register Co.,* 182 Mich. 108.

We may now emphasize the legal tests of both partial and inchoate monopolies. Every combination in restraint of trade coming before American courts is carefully analyzed and subjected to several tests of monopoly control. Its tendency to injure the public by controlling price is the most easily recognized indication of this monopoly power. Thus the concession was made by a court, which formerly held the theory of *absolute control*, that a monopoly, as now understood, "embraces any combination the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public."[39] "Again, the question in the end is," said a court of New York in referring to a *partial monopoly*, "Does it inevitably tend to public injury?"[40] At another time the Supreme Court of Ohio recognized the effect of monopoly power upon industrial liberty and upon the price of commodities: "By the invariable laws of human nature," declared the court in referring to a monopoly, "competition will be excluded and prices controlled in the interest of those connected with the combination or trust."[41] Indeed, since 1888 considerable stress has been placed in state decisions upon injury to the public through the restriction of production and the enhancement of prices; and the place which "scarcity control" occupies in the legal theory of monopoly is probably fully in proportion to its importance. It is emphasized that any combination which has a tendency to diminish production, to limit competition, and to increase prices, is a common law offence, contrary to the policy of the state, and consequently void.[42] In fact, since the great "Case of Monopolies" of Lord Coke's time,[43] raising the price of necessities by combination has been a common law offense; but on the whole, injury to the consumer is not regarded by the courts as the most serious evil of monopoly.

The second and greatest evil of monopoly here is taken to be the direct injury which it exerts upon producers. If the monopolist is only able, by means of a more efficient process, to lower values and destroy competition, his power over price is limited; but this

39 *State* v. *Eastern Coal Co.,* 29 R. I. 262.

40 *People* v. *North River Sugar Refining Co.,* 3 N. Y. Supp. 413.

41 *State* v. *Standard Oil Co.,* 49 Ohio St. 187.

42 *Richardson* v. *Buhl,* 77 Mich. 658; *Foss* v. *Cummings,* 149 Ill. 359; *Chicago Coal Co.* v. *People,* 214 Ill. 449; *Nester* v. *Brewing Co.,* 161 Pa. 481; *Pocahontas Coke Co.* v. *C. and C. Co.,* 60 W. Va. 519; *Lufkin Rule Co.* v. *Fringeli,* 57 Ohio St. 607, 609.

43 11 Coke's Rep. 86b.

partial control may, nevertheless, become an important phase of monopolistic aggression. For centuries, courts have been declaring that monopoly and restraint of trade offend the common law right of free trade between subjects, which protects alike producers and consumers. And in emphasizing these evils judges seldom get far from the important injuries to producers. For example, an early conception of a monopoly by state courts was a combination which prevented the citizen from pursuing his own business unless he migrated to some other state. Monopoly was, therefore, condemned because its general effect was to encourage idleness, injure industry, create exclusive privileges, and influence the price of things produced by labor.[44] Monopolies were also found to conflict with the common law because they destroyed trade by "extinguishing free and healthy competition."[45] The basic evils of monopoly are, therefore, said to lie in the destruction of competition, impoverishment of producers, restriction of product, and enhancement of prices. From this point of view, then, the power to fix price is only a secondary phase of monopoly control. This thought is put tersely in a Rhode Island case: "The act of fixing the price is only an attribute of a monopoly, an indicium by which it may be classified. It is a symptom, but it is not the disease itself."[46]

The third indication of monopoly power is the absence of competition between enterprises covering a definite field. This is a delicate test. It serves to differentiate the lawful coöperative combination from the partial, but not always from the inchoate, monopoly. The partial monopoly has, in the view of the courts, succeeded more or less in excluding competition and controlling price. But it would seem that the inchoate monopoly possesses full power to eliminate, though it has not definitely restricted, competition within a certain district; and in the absence of any advantage other than that of the technical process it is really an efficient monopoly. Take for example the decision of the Supreme Court of New York in *People* v. *American Ice Company*.[47] The court is really attacking a potential monopoly, or one which could

44 *Taylor* v. *Blanchard,* 95 Mass. 375; *Union Strawboard Co.* v. *Bonfield,* 193 Ill. 426; *Lange* v. *Werke,* 2 Ohio St. 527; *Lufkin Rule Co.* v. *Fringeli,* 57 Ohio St. 603; *Sutton* v. *Head,* 86 Ky. 158; *Pike* v. *Thomas,* 4 Bibb, 485.

45 *Georgia Fruit Exchange* v. *Turnipseed,* 62 So. Rep. 545.

46 *The State* v. *Eastern Coal Co.,* R. I. 265.

47 120 N. Y. *Supp.* 457-8.

not at least succeed in gaining more than partial control over the ice trade in Manhattan. The absence of competition is made the test of monopoly control, and the definition of monopoly becomes so broad that it is equivalent to a partial control over price and to a differential advantage over competitors. These comments refer more particularly to state decisions. But a federal court in deciding against the International Harvester Company, declared: "It substantially suppressed all competition between the five companies, and the restraint of competition between combining companies is as illegal as destruction of competition between them without combining."[48] Moreover, at the present time, the Supreme Court of the United States is steadily insisting upon a broad interpretation of monopoly power—a view which is in harmony with the common law definition. To vitiate a combination, it is only essential to show that it really tends to deprive the public of the advantages which flow from free competition.[49]

The fourth indication of monopoly control is the obvious *intention* or purpose of a combination to restrain or monopolize trade. This is usually shown in the excluding practices and methods so generally condemned by American courts. For example, in ordering the dissolution of the Corn Products Company, the federal court recently emphasized the deliberate purpose of the combination "which has shown such an inveterate and incorrigible insistence upon interfering with the course of commerce which the law demands."[50] In like manner the Supreme Court of the United States has condemned the acts of similar combinations, but at the same time it has drawn a distinction between the "intent" and the "method" by which unreasonable restraints may have been established. Whether a particular act is "a reasonable or normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may

48 *United States* v. *International Harvester Co.,* 214 Fed. Rep. 994.

49 *Addyston Pipe Co.* v. *United States,* 175 U. S. 224; *United States* v. *Knight,* 156 U. S. 16; *Northern Securities Co.* v. *United States,* 193 U. S. 340; *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 110.

50 *United States* v. *Corn Products Refining Co.,* 234 Fed. Rep. 1018 (1916).

become important."[51] Also, in referring to the exclusive contracts made with dealers by the Eastman Kodak Company, the court said: "All this and more, it may be conceded, separated from other acts, might furnish no ground for holding that there was an illegal monopoly; but the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage, and the keeping of records of violations of such conditions, with a view of penalizing such dealers, are evidence of an intention to promote a monopoly."[52] It will be seen at once that this particular test is psychological in character, and is especially pertinent to the detection of the inchoate monopoly.

The fifth test of monopoly depends upon the *inherent nature* of a combination which, irrespective of any vicious purpose, may be the result of several causes. (a) It may be due to the physical conditions in production. Yet these conditions may be taken as proof of a wrongful intent or purpose. For example, the Supreme Court has said in relation to the unification of the terminal facilities in St. Louis: "The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated."[53] (b) That acquired powers may constitute a monopoly is seen in another case. The supreme court of Missouri has declared that when men deliberately "acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition, nor is it any use for them to say 'We have not used the power to oppress any one.' "[54] (c) In the next place, the inherent nature to restrain trade may be largely the result of individual contracts which in themselves are wholly free from unlawful purposes. Yet the judgment of the court "is one of condemnation, no matter how innocent otherwise or praiseworthy the motives of those who had part in it."[55] (d) Finally,

[51] *United States* v. *Reading Co.* 226 U. S. at p. 370. See *United States* v. *St. Louis Terminal Association,* 224 U. S. 394; *Swift and Co* v. *United States,* 196 U. S. 375.

[52] 226 Fed. Rep. 78.

[53] *United States* v. *St. Louis Terminal,* 224 U. S. 398.

[54] *State* v. *International Harvester Co.,* 237 Mo. 394.

[55] *United States* v. *Motion Picture Patents Co.,* 225 Fed. Rep. 808.

the plan of combination as a whole may afford evidence of its illegality. "It is suggested," said the Supreme Court in a recent case, "that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."[56] In this relation another pertinent decision has appeared in a very recent case. Indeed, it was emphasized that "every element considered singly may be wholly innocent; but the question of an existing monopoly, or an intended monopoly, is to be determined by the effect of all the elements which are in fact combined."

6. Finally, we may turn to the efficiency monopoly which is established solely by more efficient methods—the normal result of better organization and more skillful management. It increases in size by building additional plants or by purchasing new enterprises; and profits are acquired because of a reduction in costs or an enlarged output. No restrictions may have been placed upon competition or trade; prices may have fallen; and consumers as a whole may have been benefited. None the less, rival enterprises are forced to discontinue production, and the more efficient competitor—a monopoly—is able to dominate the particular field of industry. We may easily recall Senator Hoar's description of the man who by superior skill and intelligence "got the whole business because nobody could do it as well as he could." This form of monopoly holds a peculiar place in American law, and its significance has not been sufficiently emphasized.

In determining its validity, it seems necessary to refer, by way of explanation, to the differential concept of monopoly presented at the beginning of this paper. The differential advantage of the monopolist under the early common law, if exercised freely, would have allowed him to control exchange values; he was therefore compelled to make separate agreements with purchasers and to charge a fair price. On the other hand, his differential advantage, according to the early English economists, was not necessarily sufficient to permit him to control price. This is the second form of the efficiency monopoly. These two distinct ideas have been applied in determining the legality of the efficiency monopoly of the present time. Any efficiency monopoly that eliminates competitors and controls price, or has the power to do so, is declared illegal. The second form of this monopoly, however, does not possess the power to control price and holds, therefore, a secure

56 *Swift and Co.* v. *United States,* 196 U. S. 396.

position in American law. These two facts explain why the validity of the efficiency monopoly is apparently a much mooted question. Courts are consistently applying to it the various tests of legality, but obviously as their theories now include the differential concept of the classical economists, a vast number of monopolies are not illegal.

The first form of the efficiency monopoly may be attacked at two points. In the first place, destruction of competition within a given area is considered in itself a restraint of trade; it discourages the development of industry and lessens the incentive to serve the public. Moreover, the direct result is to deprive men of their means of gaining a livelihood, which is the cardinal evil of monopoly. In a word, competition is necessary to secure efficient methods and needed products. In the second place, the monopoly possesses a tremendous power which may produce evil results. Consequently, courts are suspicious of such power; and if it is interpreted as an inherent tendency to injure trade, the monopoly becomes, thereby, illegal. Indeed, the large coöperative combination walks perilously close to the legal limit when it eliminates weak competitors; for it is difficult to draw the line between lawful coöperation and monopoly except by the competitive test.

On the other hand, the second form of the efficiency monopoly is usually considered legal. One federal court has said: "Size does not of itself restrain trade or injure the public; on the contrary, it may increase trade and may benefit the public."[57] Another has stated that an attempt to monopolize a part of interstate commerce, which but indirectly restricts competition, while its chief effect is to increase the trade of those who make it, was not made illegal by the statute under consideration, "because such attempts are indispensable to the existence of any competition among the states."[58] Courts reiterate that there is no limit to the normal growth of an enterprise, but this is usually qualified immediately by the statement that if the necessary result of an enterprise is to restrain trade, it becomes at once illegal. In this relation, the Supreme Court of the United States has emphasized that: "Monopolies are created in various ways, and may constitute partial restraints of trade which of themselves are not unreasonable; and contracts or combinations creating them are not necessarily invalid. The statute prohibits only such monopolies as are

[57] *U. S.* v. *Keystone Watch Company,* 218 Fed. Rep. 510.

[58] *Whitwell* v. *Continental Tobacco Co.,* 125 Fed. Rep. 463.

unjust and unreasonable restraints of trade."[59] In a word, the "rule of reason" as interpreted by the Supreme Court has served to preserve this second form of efficiency monopoly.[60]

As the previous opinions possess a remarkable pertinency to any practical plan of monopoly control, several facts should be carefully considered by both jurists and economists:

1. Starting with the differential concept of the medieval law, English courts passed gradually to the theory of an absolute monopoly; but at present there is a most positive reaction to the doctrine of partial control. Almost simultaneously the same cycle in economic thought was traced in the works of the most eminent economists; consequently, in both the fields of legal and economic theory two diametrically opposite views confront the investigator in his study of monopolies. Both theories contain certain dangers, but, above all, there lies in the theory of an absolute monopoly a constant menace to trade.

2. Again, concomitant with the idea of absolute monopoly, which was accepted practically without qualification by American courts down to 1836, there went the consistent belief that potential competition constituted an adequate remedy for monopolistic combinations. Fortunately its final rejection prepared the way for a closer study of trade restraint. Certainly, the principle of potential competition can no longer be seriously advocated either by jurists or economists.

3. Still again, with the passing of this theory due recognition was given to the growing danger from partial monopolies. Except for California, New York, and Rhode Island, our state courts had realized by 1880 the total inadequacy of the English theory of absolute monopoly control. These facts place even the more recent economic treatises on trusts and monopolies in a peculiar light; for their authors have built both the theory and the classification of monopolies almost entirely upon the deductive principle of absolute control. But even the courts of New York had discarded this overworked idea at least a decade before these books were written.

4. Clearly enough, the task of courts and legislatures has only just begun. Certain efficiency monopolies exist which never raise

59 *U. S.* v. *Eastman Kodak Co.,* 226 Fed. Rep. 65.

60 See also *Nash* v. *United States,* 229 U. S. 376; *U. S.* v. *du Pont de Nemours and Co.,* 188 Fed. Rep. 151; *U. S* v. *Eastman Kodak Co.,* 226 Fed. Rep. 80; *U. S.* v. *Keystone Watch Co,* 218 Fed. Rep. 510.

prices above the competitive level. Nevertheless, they may vanquish rival producers by the two great weapons of monopoly power —unfair competition and contractual restraint of trade. We may legislate against them, but deny the coöperative combination which gives them birth a place in our economic system we cannot. The problem of establishing a permanent rift between the coöperative combination and the efficiency monopoly is a new task which neither theorist nor legislator has yet begun to appreciate.

5. Lastly, these legal opinions have made it necessary for us to revise the usual classification, and to contrast the efficiency with the scarcity monopoly. The first endeavors to reduce costs and to drive out competitors in establishing control over an industry; the second seeks to raise prices by restricting production. The distinguishing characteristic lies in the method of price control. We must therefore conclude that the courts are struggling over a distinction between a broad and a narrow construction of the common law remedy, between a potential and an active competitive check, between the legality of a coöperative combination and an efficiency monopoly, and, finally, between absolute and partial control of trade.

C. J. FOREMAN.

University of Arkansas.